The Betlem Service Corporation *and* Local Union No. 13, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada. Case 3-CA-9331

14 December 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 29 August 1980 Administrative Law Judge Thomas A. Ricci issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs to which the Respondent filed a reply brief, and the Respondent filed cross-exceptions to which the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The judge found that, based on the Union's adamant insistence that the Respondent sign the agreement reached between the Union and the Local Employer Association on 21 May 1979 the negotiations between the Respondent and the Union for a new local agreement came to an impasse.[1] Generally, the Board will not find that an impasse has occurred unless the negotiations between the parties have been exhaustive. Here, the parties had engaged in only two formal bargaining sessions with subsequent contact through two telephone conversations. We agree with the judge, however, that the Union's refusal to consider any agreement other than the new local agreement caused impasse early in the negotiations.

Significant in our determination that the Union assumed a take-it-or-leave-it approach regarding the local area contract are the 1 June 1979 phone conversation between the Respondent's general manager, Acquilano, and the Union's business agent, Scott. During both conversations, Scott told Acquilano that the Respondent had to sign the local area contract that had taken effect that day.[2] In January and March 1979, however, the Respondent and the Union had exchanged letters stating that they wished to bargain for a new contract to replace the local agreement that was to expire on 1 June. Consistent with this understanding, the Respondent submitted its proposals to the Union at the 22 May bargaining session. The record evidences that the Respondent's proposals were never discussed or even considered by the Union. In this context, it is evident that the Union had no intention of reaching an agreement with the Respondent that differed from a new local employer association agreement and that the parties had reached impasse.[3]

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] It is undisputed that the Respondent was never a member of the Local Employer Association. However, the Respondent was an independent signatory to the 1976-1979 local area contract.

[2] During the first conversation, Scott threatened that, unless the Respondent sized the local agreement, the Respondent would possibly be shut down.

[3] We note that the discrepancies in the testimony of the Union's business agents, Farrell and Scott, further tend to undermine any suggestion that the Union had a good-faith willingness to negotiate a new local agreement with Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: A hearing in this proceeding was held on June 25 and 26, 1980, at Rochester, New York, on complaint of the General Counsel against The Betlem Service Corporation (the Respondent or the Company). The complaint issued on March 7, 1980, on a charge filed by Local Union No. 13, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (the Charging Party or the Union) on September 21, 1979. The principal issue presented is whether, by changing conditions of employment of its employees, the Respondent bypassed their exclusive majority representative and thereby violated Section 8(a)(5) of the Act. Briefs were filed by all three parties.

Upon the entire record and from my observation of the witnesses, I make the following[1]

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Betlem Service Corporation, a New York State corporation, is engaged in the business of providing and performing mechnical service and maintenance and mechanical construction and related services at and out of its place of business in Rochester, New York. During the year preceding issuance of the complaint the Respondent received gross revenues in excess of $50,000 for providing such services to customers such as American Can Company and International Business Machines, each of which receives at its New York State location goods and materials valued in excess of $50,000 originating in out-

[1] A posthearing motion by the General Counsel, mostly unopposed, to correct certain typographical errors in the transcript of testimony is hereby granted.

of-state locations. I find that the Respondent is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION

I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

The Case-in-Brief

This Company is essentially in the construction business. It has two departments: one consists of sheet metal workers, who work on sheet metal and install heating and cooling equipment. The other services and maintains heating and cooling machinery, and uses both skilled employees called journeymen or craftsmen, and less skilled persons, or apprentices, called tradesmen. The sheet metal workers are covered by a collective-bargaining agreement with their own union, through a collective-bargaining agreement with the Sheet Metal Workers Union. Neither the sheet metal workers nor their union has anything to do with this case.

For some years the Company had been party to two union contracts covering its service and maintenance men. One was a nationwide agreement between the Mechanical Contractors Association of America and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO. It was a multiemployer contract and the Respondent was a member of the multiemployer National Association. The second contract was between the Mechanical Contractors' Association of Rochester and Local Union No. 13, of the Plumbing and Pipefitting International Union. The two contracts have a relationship to one another, the second one being in fact a local addendum to the broader one, as is usual in many industries which are organized among the employees on a national basis. But in the case of the local addendum, this Respondent has never been a member of the local employer association—the Rochester group. It had nothing to do with the bargaining that went on between the local multiemployer group and Local 13 of the Union. It signed the local contract as a separate employer, after the group bargaining had ended and the group contract had been signed and completed. In short, this Company's employees were never included in a multiemployer bargaining unit insofar as the local contract was concerned. In 1979, the national contract expired on August 16. By letter dated June 5, this Company withdrew its membership in the National Employer Association and advised the International union it wished to bargain separately on its own behalf. That this was a "timely" withdrawal from that multiemployer bargaining unit is literally stated in the complaint issued in this case.[2] The National union's only response to the June 5 letter was made on August 7, 10 days before expiration of that contract, when its general president told the Respondent it should thereafter bargain with "the Local Union having jurisdiction over the appropriate geographic location."

The Local "geographic" addendum was due to expire on May 31, 1979. Not wanting to be bound by its terms beyond that date, Local 13 wrote to the Respondent on January 26, informing it that it wished to negotiate for a new agreement. It sent exactly the same notice to about 30 other employers who, like the Respondent, had each separately signed the local group contract. The Respondent replied on March 27 and offered to meet in collective bargaining. The parties met on May 22 and May 29 with Robert Scott, a business agent of Local 13, on behalf of the Union, and Dominick Acquilano, general manager of the Company, on behalf of the Employer. On May 22 the parties exchanged written, comprehensive proposals for a new contract. They never met again.

In August, about 3 months after the local contract had ceased to be binding on this Company and after the national agreement had expired, the Respondent informed all of its employees it was then and there putting into effect all the contract proposals affecting conditions of employment it had offered to their local union in May.

The complaint alleges that, by this one act of putting into effect the complete offer which Local 13 had refused to agree to in bargaining meetings, the Respondent made a unilateral change in conditions of employment and thereby violated Section 8(a)(5) of the Act. Although, in classic fashion quoting from the statute, the complaint also alleges that the Respondent "refused to bargain," the General Counsel conceded, on the record, that the Respondent is not charged with literally "refusing" to meet or discuss or bargain. It is admitted the Respondent never withdrew recognition or said "no" when the Union asked for a meeting. It is solely the act of bypassing the exclusive bargaining agent that is said to have been wrong.

While denying that it did what it did August 18 without consulting with or even formally advising the Union in advance, the Respondent defends on the ground that it had a right, under Board law, to do that because of the adamant, revealed, and absolute unwillingness of the Union even to look at, much less negotiate about, its proposed changes in condition of employment. Restated: Its contention is that an impasse had been reached such as to justify the Company in running its business as it thought right.

In sum, it is a pure question of fact to be decided on the record in its entirety. Is it true, as now asserted by the Company, that Local 13 was determined, from the very beginning, to give no consideration at all to the Company's proposal, to reject it out of hand and with total disregard of any question of merit, and to have nothing to do with the entire package regardless of any details listed, not even to talk about it? The entire case turns on this one question.

There are several seemingly separate allegations of violations of Section 8(a)(1): a threat by the Company not to sign the Union's contract, interrogation of an employee, etc. These are but paraphrasing of the principal unfair labor practice alleged. Also, a man left the Company one Friday and went to work at another company

[2] The pertinent language of the complaint reads as follows: "On or about June 5, 1979, Respondent timely withdrew from the Association and bargaining as part of the multi-employer group . . . ."

the following Monday. The Respondent offered to take him back 2 weeks later, but he refused.

Evidence, Analysis, and Conclusion

I find, all pertinent factors considered, that there was an impasse in this situation and that the Respondent did not violate the statute when it changed the conditions of employment on August 18. This findings rest in part on what was said at the time of the events, in part on what the parties did at the time, and in part on what was said in course of the hearing. Throughout the transcript there was a confusing use of words, a distortion of nouns creating a certain impression whereas the reality of what was meant was something else. This suggestive language, as it were, will be clarified if first the nature of the dispute which arose be understood.

Under the expiring contracts, the Company was obligated to and did contribute to the pension fund maintenance by Local 13, a benefit enjoyed by the employees for their work. It also paid directly to the Union, a certain amount, measured by the payroll, for health insurance benefits. A third contractual burden was that instead of giving the employees time off, with pay, for holidays and vacations the Company paid a certain amount per hour worked, again directly into Local 13's coffers, the employees, I assume, then enjoying the benefits by payments made by the Union. One other item will suffice. There was—and now I mean both International and Local Union—a contractual clause supporting a training program to encourage the development of new journeymen in this craft, called the "advancement fund"; under the terms of the national agreement the Respondent had to pay so much money every so often into that fund. There were other items in the two lengthy contracts touching on union prerogatives, or obligations placed on the employer, but the foregoing will suffice to make clear what the case is all about.

In its written proposals to Local 13 on May 22—a very detailed statement covering all the usual things such as direct hourly rate payments as well as fringe benefits—the Respondent said it would no longer make all these listed payments to the Union. Instead, it offered to give the employees just plain paid holidays and vacations, and to pay to them directly into their hands the same percentage of earnings for hospital insurance and pensions, and let them take care of their future as they saw fit, And, of course, it wished to discontinue any payments for supporting the Union's educational training program.

That same day, on May 22, Scott of Local 13 handed Acquilano, the company man, an equally detailed prepared proposal. It reflects essentially the final agreement which the Local Union had reached with the Local Employer Association of Rochester the very day before—on May 21.[3] And, of course, the Local's proposals included all the above-listed money contributions to be made by this Company directly to the Union. Acquilano said he was having no more of that.

In the talking that then followed, among the employees as well as between them and the company or union representatives, the question—whether this Company was going to or was not going to sign the "Union contract"—became rampant. For 2-1/2 months—June, July, and half of August—there was much uncertainty, in the minds of both the employees and management representatives, as to what was going to happen. Would Local 13 agree that 1 out of 50 companies in the same "geographical location" could operate free of the Union's "conditions" that bound all the other companies? Would it sit by while 20 of its members worked under such "nonunion" conditions—to use a phrase repeatedly uttered by its witnesses? In conceding, as she did, that the Respondent never withdrew recognition from the Union as the accredited bargaining agent, the General Counsel was negating the idea that the Respondent was motivated by the classic union animus of which the cases speak. But counsel for the Union kept arguing that what the Company wanted was to get rid of the Union completely.

Perhaps the heart of the case is best spelled out in the complaint itself, which alleges it to have been an unfair labor practice by the Respondent to have threatened, out of the mouth of Ronald Wolfe, a supervisor, that it "would not sign a *union* contract." (Emphasis added.) The General Counsel very meticulously amended the complaint at the start of the hearing by adding the allegation that a separate unfair labor practice was committed by Acquilano, the general manager, when he said the Respondent "would not sign a contract *with the Union*." (Emphasis added.) Both statements (and the whole case rests on them) are just not true, and on that score the record could not be plainer. Acquilano testified that in his first meeting with Scott, on May 22, when he handed over the Company's proposal the union agent looked at them and said: "We can't go along with these things . . . . We fought for these things for years and we're not going to give anything up." I credit this testimony by Acquilano.

In normal parlance, when an employer says, in the course of an organizational campaign or even during initial contract negotiations, "I will not sign a union contract," he is rejecting the basic principle of the statute, the duty to deal in good faith with the employees' chosen representative. When General Manager Acquilano and his assistant Wolfe expressed the thought this Company would not sign "the Union contract"—and it really does not matter what precise words they used they were saying something totally different. They were saying the Respondent was rejecting—with grim determination and with full awareness of the economic difficulties likely to follow—the sort of contract Local 13 had long had with the Employer Association and was sure to resume immediately at the same time. The word "union" in the mouths of Acquilano and Wolfe did not mean group action, employees acting in concert, or an exclusive voice speaking on behalf of the Respondent's employees. They were talking about the "contract"

[3] Christopher Farrell, the top man in Local 13, said at the hearing that the proposals handed the Company by his subordinate on May 22 were "more favorable to the union than the agreement reached with the Association." But his assistant, Scott, who was the front man in the bargaining, contradicted his superior, by making clear that what he demanded of this Company was precisely what had been won from the local employer group the day before.

which Local 13 always make with the Rochester Association, and the one those parties had just finished making—entirely without this Company's participation. Acquilano offered to continue the same hourly rate of pay prevailing in the "geographical location" via the Local area contract and to sign up with Local 13, binding itself to continue making those same payments. Indeed, Acquilano would have loved nothing more than to have Scott, the lowest echelon of authority in Local 13, say, "Yes," and sign the agreement for his Union.

Carl Roda, then an employee, quoted Acquilano as saying "he was thinking of possibly not signing the local agreement . . . ." John Kiehle, then also an employee, testified that while chatting with Wolfe, the Company's dispatcher and an admitted supervisor, Wolfe told him that "[h]e didn't think Dominick [Acquilano] would sign the contract."

My first finding is, therefore, that the complaint allegations that anyone on behalf of this Company voiced a threat to refuse to bargain with the Union, or any union, are not supported by any evidence in this record.

That throughout the bargaining in May and continuing into late August the Union was insisting on acceptance of its newly negotiated contract with the Rochester association, while refusing even to look at the Company offer, is proved beyond question by a number of facts.

1. Farrell, the Local 13 business agent, sent his subordinate to do the bargaining with this one Company. He said that there was only one meeting between Scott and Acquilano. He was just trying to eliminate from the picture Acquilano's attempt to sell his proposal, for Scott spoke clearly of two, not one meeting. By implication Scott tried to create the impression that the Company's offer was considered by the Union. But he also said he never talked to anyone about those proposals.

> Q. In reviewing them [the Company's written proposals] did you discuss them with anyone else?
> A. No . . . .
> Q. Nobody in the Union?
> A. No. Asked at one point had Scott shown him the Company proposals, Farrell said: "There were some proposals but they had to be deciphered before we knew what Mr. Acquilano was talking about."

This was the business manager trying to explain away the Union's obvious indifference to whatever it was the Company was proposing. Later, shown the two-page proposals handed to Scott on May 22, Farrell was asked had he ever seen it. Then came the following:

> Q. Mr. Farrell, I show you Respondent Exhibit 2 in evidence, and ask you if you have ever seen that document?
> A. Very quickly, yes . . .
> Q. You mean at the time very quickly?
> A. I didn't bother to read it. I have seen the document. I didn't read it.

It would be difficult to imagine a stronger indication of uncompromising rejection of a complete proposaal than this.

2. Although not precisely clear in the record, it seems that, of the 50 or so companies in this business in the Rochester area, 18 are members of the Local Employer Association and are bound by the multibargaining via such membership. Close to 30 more each sign separately as this Respondent did in the past. Farrell denied he wanted this Company to sign the same contract the Association had settled on May 21:

> Q. Now, isn't it a fact, Mr. Farrell, that your union wanted Mr. Acquilano to sign the same contract that the Association had signed?
> A. Absolutely not . . . . we negotiate agreement. We try to get the most advantageous position for the Union.

And then came the following:

> But as far as the plumbing and the service business and the maintenance business and the construction business that Betlem Service Corporation is concerned with; have you ever varied the terms of any of the contracts other than the Association's?
> . . . .
> THE WITNESS: Never.

3. Further proof of the Union's adamancy in demanding acceptance of its association, area contract, is seen in repetitive statements that clear expiration of the 1976–1979 area agreement notwithstanding the fact that the Respondent was bound by that agreement nevertheless. The national agreement, which bound this Company up to August 17, provided, inter alia: "[T]he Employer and the Union agree that local area Mechanical Maintenance and Service Agreements will be negotiated and such agreements will provide wage rates and fringes and working conditions . . . ." It was pursuant to that clause—still binding on this Company to August 17—that the Respondent started bargaining with Local 13 in May. To say, as union agents did a number of times at the hearing, that this Company was "bound" by the Local agreement, settled on May 21 and in effect on June 1, ignored the plainest contract language. This, to say nothing of the complete inconsistency between that position and the simultaneous bargaining that was going on, with the Union even saying there never was an impasse. At least the general president of the International union read this contract correctly when he wrote to Acquilano, with a copy to Farrell, on August 7, to tell both of them that "separate negotiations would have to be between your company and the Local Union . . . ."

Denying, at one point, having said he insisted on the Respondent's signing the area agreement, Scott explained: "There's a section in the National Agreement which binds them to wages and fringe benefits for a local agreement for any work not covered in that Service and Maintenance Agreement." Scott also spoke of a June 5 conversation with Acquilano: "I told him that the new agreement had been enforced since the previous Friday [June 1] and according to the National agreement, any work not covered by the service and maintenance agreement would have to be done and paid at the prevailing

rate called for in the local agreement." To clarify any ambiguity, he was then asked:

> Q. What is the Service and Maintenance Agreement? The word Agreement means a contract. Which contract are you talking about?
>
> THE WITNESS: The National Contract.
>
> JUDGE RICCI: Any work that was covered by the National Contract had to be paid by this Company according to the renewed local agreement; is that what you are saying?
>
> THE WITNESS: Yes, sir.

4. In my considered judgment, the ultimate fact that the Union, from the beginning, arbitrarily refused to give any consideration to the Company's desire is also evidenced by its counsel's off-stated position that the Employer was bound to honor the terms and conditions set out in the newly renewed local area contract, and never mind the fact this Company had nothing to do with it. If I understood his position at the hearing, it rests in part on a clause in the then still-in-effect national contract on the subject "Subcontracting." That one reads: "Any other work in the control of the Employer signing this Agreement that falls in the jurisdiction of the United Association . . . shall be done in accordance with the prevailing Building Construction Agreement of the Local Union having jurisdiction." Another section of the National Contract says: ". . . wage rates, workmen's compensation, hours of work shifts, shift premiums, overtime . . . shall be in accordance with the established local Mechanical Equipment Service and Maintenance Agreements . . . ."

Counsel misstates this contract. The Respondent was trying to bargain with the Local, as the national agreement said it must. (See its sec. 5, above.) To say that it was "bound" by what other signers of the National Contract had agreed to—and this is precisely what counsel was saying—is but another way of saying this Company had no choice but to accept Local 13's offer of May 22. The very stated position strengthens my credibility finding that Acquilano told the truth when he quoted Scott as explaining he would never give up what his Union had won over the years!

Indirect as it may be, I see this as further proof of what emerges from the record as a whole. The Union wanted this Company tied to its local association contract and nothing else.

5. There are more supporting facts. Seeking to avoid the conclusion the Union was doing nothing more than insisting the Company sign exactly the same contract just accepted by the Local Employer Association, Farrell said, at one point in his testimony, that the offer made by the Union to this Company was more advantageous to the Union than what it had offered the Rochester Association. One must wonder: What are chances the Union would expect more from the independent recalcitrant company that it sought from all the rest? But again, in conflict, is the testimony of Farrell's messenger, who admitted, at the hearing, the Union's proposals were "the same proposals that you made to the Mechanical Contractors Association, by you, I mean the Union; is that correct? Yes. Q. There is no variance at all? A. No."

6. And finally there is the Union's brief, filed after the close of the hearing. An important credibility question was raised at the hearing. Acquilano testified that he last talked to Scott on June 1 by telephone. He called the union agent to ask what was happening and was told, as he testified, ". . . he was enforcing the National Agreement. . . . unless I signed the agreement that we would possibly be shut down. . . . the Local Agreement." Acquilano answered the agent that he was "not going to sign an agreement that was made for somebody else," but he wanted to negotiate his own. Acquilano also testified that Scott called him back that day to repeat he, Acquilano, had to sign the local area contract that had taken effect the same day. Acquilano closed with saying he never again heard from any representative of the Union.

Scott denied having talked at all with Acquilano on June 1; he said he telephoned that day and asked the office girl to have Acquilano call him back, but that the manager never did. Scott also testified he called on June 4 and did talk to Acquilano. "I advised him that according to the National Agreement, that he was signatory to, he was bound to implement the new agreement which had been agreed upon with the Association . . . . The Local Mechanical Contractors Association." "He told me he still wanted to negotiate the agreement. I advised him; when he wants to meet we would be available to meet, we would set up a meeting." The essence of Scott's story, in total, is that Acquilano's failure to communicate with him thereafter proves the Respondent refused to continue negotiations, that it just refused to bargain.

I credit Acquilano over Scott. Entirely apart from the facts of record, set out above, which point clearly in support of Acquilano's version of the events, the Union's brief removes any doubt on that score. It will be recalled that in January and March the Respondent and Local 13 exchanged letters saying they wished to bargain for a new contract to replace the local agreement due to expire on June 1. This Company was never a member of the Rochester Mechanical Association, which was going to bargain with Local 13 separately on a multiemployer basis. This Company and this Union met and talked during May. At the hearing the Union complained that the Respondent did not bargain enough, insisting that what talking took place was too little to justify the Company in putting its offer into effect unilaterally. While talking with the Company's manager, Local 13 went about its business of negotiating with the Rochester group, came to terms with it on May 21, and signed a new contract to take effect on June 1.

In its brief the Union now says, "The Parties' Conduct in May is Irrelevant," "there was no obligation on the Union's part to even discuss Respondent's proposed contract," and the Company "was bound" by the new agreement reached on May 21 between Local 13 and the Rochester employer association! And in the face of the dispute in testimony—did Scott, of the Union, or did he not tell employer Acquilano it was the local area agree-

ment or nothing?—Local 13 now says Scott did tell the man, early in June, he was bound by the agreement his Union had made with the multiemployer group. What better proof that the Union's agents never looked at much less gave any thought to what the Company's proposals were than this? If ever there was a case showing absolute and adamant rejection of a contract proposal, leading to impasse in an absolute sense, this is it.

More farcial still is the further contention by the Union in its brief, that because the Respondent, up to the day the national agreement expired on August 16, made payments to various union funds which it was not obligated to do, it must be deemed to have adopted the new area agreement reached by Local 13 and the Rochester group. With the Respondent telling Scott, as clearly as anyone could talk, that his Company was going to make its own separate and different deal with Local 13, this agreement in the brief speaks as though the hearing in his case had never been held at all.

There were various clauses in the national agreement saying how once a company signatory had "negotiated" such things as "wage rates and fringes and working conditions," it would have to live up to them and be bound by them. Local 13 now twists this into meaning that even if somebody else—like the Rochester group—"negotiates" a local deal, the party who had nothing to do with that is nevertheless bound to make those payments and contributions. And, of course, never mind the fact that, still as the national agreement requires, that individual employer was in process of bargaining as the local itself requested.

The truth of the matter is that the impasse reached in this case was not so much the Union's total and the final rejection of the Employer's proposals, but instead the Union's total and adamant insistence that the Respondent just sign the area contract lock, stock, and barrel. It made no difference at all to the Union what details were set out in the Company's comprehensive, written proposals. The union agents did not even look at it. For the Union to say now—as it also argues in its brief—that an unfair labor practice must be based on the fact the Company, when it put its offer in effect unilaterally, deviated in some small detail or other from its original May 29 proposals is a still further attempt to change the entire picture of the case. The last thing that concerned this Union in the dispute was any particular jot or tittle of what the Company wanted to do.

I shall recommend dismissal of the 8(a)(5) allegation of the complaint. *Alexander Typesetting*, 207 NLRB 301 (1973).

During June the union agents started a campaign among this Company's employees trying to get them to sign union authorization and membership cards. There was much resistance among the employees. Manager Acquilano is now charged with telling employee Kiehle not to sign such a membership card, an unfair labor practice, according to the complaint. This idea highlights a further incoherence that runs through the entire case. Acquilano denied having asked Kiehle had he signed a card; his testmony is he told the man he did not care what he did about that. According to Acquilano, he called the man at home about an assignment to be made and, when the man started talking about going to the union hall to sign a card, he told him, "Jesus, you do your job first and then you can go the local . . . go after working hours but do your job first."

Kiehle also testified about a conversation with Wolfe, the dispatcher, his old friend, They sat in a bar 6 or 7 hours discussing the uncertain situation: "We were relieving a lot of tensions . . . . The job situation about not knowing whether we were going to—the shop was going to stay union or nonunion." Kiehel added that as the two discussed the problem at length Wolfe asked him if he knew what the Union was going to do.

In August, Dominic Acquilano, the son of the manager, told Kiehel he was being laid off "due to a shortness of work," adding he thought "it was a good time for me to leave before they started the picket line out in front." Kiehle continued he then voiced his concern about working under noncontract conditions, he having only 7-1/2 years credit under the Union's pension plan, with 10 years required before rights would vest. Acquilano then told him he could get a job at a company called McShaw, which was covered by a union contract, and where they "would need a man pretty soon."

The complaint alleges that both Acquilano and Wolfe illegally interrogated Kiehel about his union activities and that the Respondent fired him that day in August because of his union activities, all unfair labor practices. Curiously, however, Kiehel also testified, about the McShaw job: "I had the job lined up prior to this . . . . The job was lined up before he ever laid me off . . . . It was at least of 3 weeks prior." In fact, the very next Monday he started work at McShaw. And when, 2 weeks later, the Respondent called him back, he refused to return.

I will recommend dismissal of all these complaint allegations. If Kiehle had already arranged to go elsewhere, it means at the least that he well knew his work was slacking off, exactly as Acquilano told him. Besides, if he had not moved, his retirement would have been endangered or at least lessened. And, if Acquilano did agree with him that work in a "union contract" shop would benefit him, he was stating no more than what everybody well knew that day.

There is more to weaken the inference that this man's layoff was anything but in the regular course of business. Kiehel signed an investigation affidavit in this matter; there is no mention in it anywhere about employees signing union cards of any kind, much less about any conversations with any members of management on the subject. Kiehle explained this failure, which greatly clouds his contrary testimony, by saying he was "advised . . . that it wasn't relevant to the case." Asked who had "advised" him to keep quiet about the cards, he said it was "counsel before I met with the Board agent," meaning counsel for the Union, after he had already talked to Scott and another union representative! I credit the Employer witnesses' denials.

Besides all this, there was no conceivable reason why any representative of management would want to interrogate an employee illegally on the question of whether or not he was signing a union membership card. All

these employees were, throughout these events, dues paying members of the Local 13. And the Company was even them continuously checking off their dues and forwarding them to that Union. Why should this Union, during these events, be soliciting authorization cards from its own members? There is simply no explanation anywhere in this record or in the briefs that were filed that sheds any light on what was no more than a further obfuscation of virtually everything the prosecution side of the case was doing.

Recommendation[4]

I hereby recommend that the complaint be, and it hereby is, dismissed.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.